

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

LISA MARKS-SMITH,	*	
	*	
Petitioner,	*	No. 08-723V
	*	Special Master Christian J. Moran
v.	*	
	*	
SECRETARY OF HEALTH	*	Filed: July 24, 2009
AND HUMAN SERVICES,	*	
	*	influenza vaccine; myositis, bilateral
Respondent.	*	peroneal neuropathy; GBS, ruling on
	*	entitlement, respondent does not
	*	contest.

Michael A. London, Douglas & London, P.C., New York, NY for petitioner;
Lisa A. Watts, United States Dep't of Justice, Washington, D.C. for respondent.

UNPUBLISHED RULING ON ENTITLEMENT*

On October 14, 2008, Lisa Marks-Smith filed a petition for compensation alleging that she developed myositis and bilateral peroneal neuropathy, and the sequela of each, as a result of an influenza vaccination, which she received on October 15, 2005. She seeks compensation pursuant to the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 et seq. (2006).

A. Finding Regarding Petitioner's Receipt of the Influenza Vaccine

To resolve any controversy regarding her receipt of the influenza vaccine, Ms. Marks-

* Because this published decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

All decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, a party has 14 days to identify and to move to delete such information before the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access. 42 U.S.C. § 300aa-12(d)(4); Vaccine Rule 18(b).

Smith filed a motion for a preliminary ruling seeking a finding that she received the influenza vaccine on October 15, 2005. Pet'r Mot., filed July 6, 2009.

A preponderance of the evidence supports a finding that Ms. Marks-Smith received the influenza vaccine on October 15, 2005. At least three records that were created within four weeks of October 15, 2005, refer to Ms. Marks-Smith having received the influenza vaccine recently. Exhibit 6 (record from Mercy Franciscan Hospital - Western Hills, dated Nov. 20, 2001) at 6-7 and 6-37; exhibit 8 at 8-65 (Rheumatology Consultation from Christ Hospital, dated November 9, 2005); exhibit 12 at 12-14 (discharge summary from Christ Hospital, dated November 12, 2005). In addition, following Ms. Marks-Smith's release from the hospital, she saw Dr. Dolly Boughaba for treatment of her injuries. Dr. Boughaba notes that Ms. Marks-Smith received an influenza vaccination. Exhibit 9 at 9-1 (treatment record from Dr. Boughaba, dated Jan. 23, 2006). In addition, Ms. Marks-Smith prepared an affidavit and filed three additional affidavits from family members who either also received influenza vaccinations at the same location and on the same day as Ms. Marks-Smith or who spoke with Ms. Marks-Smith about her vaccination. See exhibits 20-22, 24. Moreover, Ms. Marks-Smith's brother, Jeff Marks, was present with Ms. Marks-Smith when she received the vaccination and witnessed the event. See exhibit 20 at ¶1 (Affidavit of Jeff Marks, dated July 6, 2009).

Respondent concurs with petitioner that sufficient evidence has been filed to allow the undersigned to make a determination regarding Ms. Marks-Smith's receipt of the influenza vaccine. Resp't Resp., filed July 15, 2009, at 3. Collectively, this information constitutes a preponderance of the evidence.

B. Finding Regarding Causation

Respondent has chosen not to contest entitlement and has stated that she will not expend further resources to contest entitlement in this case. Resp't Resp., filed July 15, 2009, at 3.

Special masters may determine whether a petitioner is entitled to compensation based upon the record. A hearing is not required. 42 U.S.C. § 300aa-13; Vaccine Rule 8(d).

Although the Vaccine Act contains a table in which certain injuries are presumed to be caused by certain vaccines, petitioner may not take advantage of any presumption because the influenza vaccine is not associated with any injury. 42 C.F.R. § 100.3(a); see also 70 Fed. Reg. 19092 (adding trivalent influenza vaccine to the table). Under these circumstances, petitioner bears the burden of establishing that the influenza vaccine caused the injury for which she seeks compensation. Althen v. Sec'y of Health and Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005). Proof of medical certainty is not required; a preponderance of the evidence suffices. Bunting v. Sec'y of Health and Human Servs., 931 F.2d 867, 873 (Fed. Cir. 1991).

Under the statute, the court cannot grant a petitioner compensation based solely on the petitioner's allegations. Rather, the petition must be supported by either medical records or by the opinion of a competent physician. 42 U.S.C. § 300aa-13(a)(1).

Ms. Marks-Smith's condition, which she has alleged as the compensable injury, is Guillain-Barre variant syndrome (or "GBS"). In his expert report, petitioner's expert, Dr. Thomas Morgan, attributes the two week onset time of Ms. Marks-Smith's symptoms, as being consistent with an autoimmune reaction to the influenza vaccine. Dr. Morgan also references and discusses four pieces of medical literature to support the medical plausibility of a causal connection between GBS and the influenza vaccine.

In other cases, petitioners have also presented persuasive evidence that the influenza vaccine can cause GBS. They also provide information about the interval between the vaccination and the onset of GBS expected by medical science. Heinzelman v. Sec'y of Health & Human Servs., No. 07-01V, 2008 WL 5479123, at *5(Fed. Cl. Spec. Mstr. Dec. 11, 2008); Gaza v. Sec'y of Health & Human Servs., No. 07-290V, 2008 WL 6082761, at *4 (Fed. Cl. Spec. Mstr. Aug. 1, 2008). Special masters may use expertise accumulated from other cases. Lampe v. Sec'y of Health & Human Servs., 219 F.3d 1357, 1362 (Fed. Cir. 2000), quoting Hodges v. Sec'y of Health & Human Servs., 9 F.3d 958, 961 (Fed. Cir. 1993).

Given that the respondent has opted not to contest this matter further by obtaining an expert or by challenging the evidence contained in the record, and having reviewed the medical records and the supporting opinion of a medical expert, the Court finds that petitioner has established that she is entitled to compensation.

A status conference is set for **Thursday, August 13, 2009, at 3:00 P.M. Eastern Time.** The Office of Special Masters will initiate the call.

Any questions may be directed to my law clerk, Francina Segbefia, at (202) 357-6358.

IT IS SO ORDERED.

S/ Christian J. Moran

Christian J. Moran
Special Master